In The

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MICHAEL RODAK, JR.

Supreme Court of the United States

October Term, 1975

No. 75-523

SAMUEL KAPLAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Judgment of United States Court of Appeals 1a

In The

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No.

SAMUEL KAPLAN,

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Samuel Kaplan, prays that a writ of certiorari issue to review the judgment entered on September 5th, 1975 by the United States Court of Appeals for the Second Circuit in the proceeding entitled *United States of America, Plaintiff-Appellee v. Samuel Kaplan, Defendant-Appellant,* Docket No. 75-1211.

OPINIONS BELOW

The Court of Appeals affirmed petitioner's conviction without opinion. The judgment appears in the Appendix at page 1a. Petitioner's first conviction on these charges was reversed in *United States v. Kaplan,* 510 F.2d 606 (2nd Cir. 1974). This conviction followed the retrial of that case.

JURISDICTION

The judgment of the Court of Appeals was entered on September 5th, 1975. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's right to due process was violated where the District Court failed to obey the clear mandate of the Circuit Court's initial judgment and, thereafter, another panel of the Circuit Court condoned that action?

2. Whether the evidence in this case was sufficient to have allowed the introduction of crucial hearsay under the co-conspirator exception to the hearsay rule where the Government's case disclosed only an isolated narcotics transaction?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V, stated in part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in

any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The petitioner, Samuel Kaplan, was convicted in the United States District Court for the Eastern District of New York of one count of violating Title 21, United States Code, Section 841(a)(1) for his alleged sale of less than one ounce of heroin. This case was tried twice. Petitioner's first conviction was reversed in *United States v. Kaplan,* 510 F.2d 606 (2nd Cir. 1974). The issues presented in this petition relate to the introduction of hearsay testimony which was the same testimony on which the Circuit Court initially reversed Kaplan's conviction.

The facts may be simply stated. The Government's proof at both trials was the same. The prosecution's case was based almost entirely on the testimony of Nicholas Alleva, a Drug Enforcement Administration agent. Alleva testified that in late 1971 and January, 1972, while acting in an undercover capacity, he purchased small quantities of heroin from one Frank Lang (A25).[1] On November 29th, 1971, Alleva bought one ounce of heroin from Lang and later complained that the quality was poor (A26). Although this November 29th sale made Lang liable to immediate arrest, Alleva continued to play the role of a wary

1. The letter "A" refers to Appellant's Appendix on file in the United States Court of Appeals for the Second Circuit.

buyer in order to discover and then arrest the individual who supplied Lang with the narcotics.

On January 5th, 1972, Alleva telephoned Lang to arrange another one ounce purchase (A26-27). During this conversation, a meeting was arranged for the following afternoon at Lang's home where Alleva would receive the drug (A26). Alleva was also allegedly told by Lang that his "connection" would be present on the following day.

On January 6th, 1972, at approximately 2:00 p.m., Alleva arrived at the Lang residence according to the arrangement. Entering Lang's bedroom,[2] Alleva confronted not only Lang, but allegedly the petitioner as well. Although Lang actually then gave the heroin to Alleva, the attendant conversation, according to Alleva's testimony, indicated that petitioner was a participant in the sale (A30-35). Subsequently, both Lang and Kaplan were arrested by agents on surveillance duty outside the house.

As in the first case, Kaplan met the Government's proof with a factual defense. Witnesses called by the defense disclosed that Kaplan was a long-time friend of the Lang family and had become very close with Frank Lang (A89). Both Kaplan and Frank Lang had previously worked in the carpet industry (A90). Frank Lang's married sister, Patricia Ruggerio, testified that Kaplan was present on January 6th in order to help her brother obtain employment as a carpet layer (A90). This testimony was partially corroborated by another witness who recalled that Kaplan had made an effort on that day to secure employment

2. At the time, Lang resided with his parents and sister.

for Lang (A116-117). In reviewing Kaplan's first conviction, the Circuit Court noted that:

> "The evidence against appellant, though enough for a valid conviction, was by no means overwhelming." 510 F.2d at p. 610.

The Government's case, which essentially rested on a single witness, taken with the defense case, presented a close factual issue for the jury's consideration.

REASONS FOR GRANTING THE WRIT

Following the arrest on January 6th, 1972, both Lang and Kaplan were indicted for the possession and sale of heroin. Prior to trial, however, Lang died. The superseding indictment on which petitioner was tried charged both possession and sale of heroin on January 6th, 1972.[3] Considering that the Government's case was not "overwhelming," Lang's alleged statement on January 5th that his "connection" would be present on the following day was appropriately described as "a potent addition to this case." 510 F.2d at p. 610.

In *United States v. Kaplan,* the conviction was reversed because this testimony was admitted under what was found to have been an erroneous theory. During the first trial, the District Court Judge admitted the hearsay under the "state of mind" exception to the hearsay rule on the premise that Alleva's state of mind, when he met Kaplan on January 6th, was relevant. In *United States v. Kaplan,* the Court ruled that the "state of mind"

3. Upon retrial, petitioner was acquitted of the possession count.

exception was inappropriate under the facts of the case and left open the question of whether the District Court would have been sustained had the co-conspirator exception to the hearsay rule been applied.

At the second trial, this same hearsay was admitted under the latter theory, the co-conspirator exception. The conversation was related by Alleva in the following manner:

> "Q. Directing your attention to January, 1972, do you recall a telephone conversation which you had with Mr. Lang? A. Yes, I did.
>
> Q. On what date? A. On January 5th.
>
> Q. Can you tell us who made the phone call? A. I called Lang.
>
> Q. Where did you call him? A. At his residence.
>
> Q. What did you say to him and what did he say to you?
>
> MR. SHARGEL: Note my objection to this, your Honor.
>
> THE COURT: Yes, objection is overruled and you have an exception.
>
> A. The phone call was an extension of our discussion as to the quality —

MR. SHARGEL: I object as not responsive to the question.

THE COURT: Overruled. Go ahead.

A. It was an extension of our discussion as to the quality. I told him I was completely dissatisfied with the previous purchase and that I wanted a better quality on the next purchase. Lang told me that this would be done as his connection would be at his house tomorrow at 2:00 p.m. and that I should go there with another $1300 and I could get an ounce of heroin which would be much better quality.

Q. What did you say? A. I agreed" (A26-27).

Petitioner unsuccessfully argued in both the District Court and the Circuit Court, following his second conviction, that the Circuit Court's earlier decision in *United States v. Kaplan,* precluded the introduction of this testimony. In *Kaplan,* the Court ruled that:

> "*In all the circumstances,* therefore, appellant is entitled to a new trial *at which this hearsay will be excluded.*" 510 F.2d at p. 610. (Emphasis supplied.)

Recognizing that the case would "presumably be retried," see Footnote 4 at p. 612, the Court, considering "all the

circumstances" directed that his hearsay should be excluded at the retrial. The District Court, however, and the Circuit Court by implication, found that the dictum regarding the co-conspirator exception contained in the original opinion obviated this directive and permitted introduction of the testimony under the alternate theory.

Despite the dictum contained in the Circuit Court's opinion reversing the earlier conviction, the ruling contained an express provision that the case was to be retried without this hearsay.

It is well-settled that the District Court, upon remand or retrial, had the obligation to follow the mandate of the Circuit Court. In *United States v. Fernandez*, 506 F.2d 1200 (2nd Cir. 1974), the Second Circuit Court of Appeals recognized the rule that:

> "Where a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court.
>
> 1B J. Moore, Federal Practice, Par. 0.404[10] at 571 (2d Ed. 1974) . . . . See, also, *Munro v. Post*, 102 F.2d 686 (2nd Cir., 1939); *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895)."

Despite the clear mandate contained in the Circuit Court's original opinion, the District Court, upon retrial, nevertheless admitted the evidence. In affirming petitioner's second

conviction, the Circuit Court sustained the District Judge's ruling that the very same testimony could be admitted under the co-conspirator section to the hearsay rule. Petitioner herein submits that the Circuit Court's original view of this vehicle for admission of the hearsay in *United States v. Kaplan* was merely dictum and should not have permitted the alternate finding.

Assuming *arguendo*, however, that the "law of the case" is inapplicable to the case at bar, it is submitted that the ruling herein reflects a dangerous expansion of the evidentiary rule which allows the introduction of a co-participant's statements made during the course of a criminal venture.[4] The law is clear that the co-conspirator exception to the hearsay rule applies only when the statements are made during the course of the conspiracy. *Lutwak v. United States*, 344 U.S. 604, 617 (1953). Petitioner contends that there was, in this case, insufficient proof that Lang had entered into an agreement with him on the day prior to the sale, January 5th.

Although Agent Alleva met with Lang on some four occasions in late 1971 and January of 1972 to discuss or purchase heroin, petitioner does not come into the picture until 2:00 p.m. on January 6th, 1972 (A57). Moreover, there was nothing said by Lang either on January 5th or January 6th to identify Kaplan as his source or connection on any prior occasion. Nor, as the Government argues, is there anything said by Kaplan on January 6th which would sufficiently indicate that he had previously supplied Lang with the illicit drug. In the Lang residence on January 6th, Alleva attempted to place the

4. There was no conspiracy count charged in the indictment. However, petitioner was charged as an aider and abettor. Title 18, United States Code, Section 2.

purchase in the context of his entire dealings with Lang. Surely, the plural references are too oblique to support a finding that Kaplan had actually been involved. It is particularly important to note that prior statements of Alleva reflected earlier conversations with Lang wherein Lang stated, in effect, that he had many sources of heroin and that one was drying up after another (A16). There was, therefore, no continuity or pattern which would indicate any prior collusion between Lang and Kaplan.

It is well established that the requisite independent evidence of illicit association may be totally circumstantial and may be proven by evidence of acts occurring after the time at which the association is alleged to be in existence. *United States v. Ragland,* 375 F.2d 471 (2nd Cir. 1967). However, the mere fact that a sale occurred on January 6th does not adequately establish that there had been a prior association.

In *United States v. Borelli,* 336 F.2d 376 (2nd Cir. 1964), the Second Circuit Court stated that:

> ". . . a sale or purchase scarcely constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties for whatever period they continue to deal in this type of contraband, unless some such understanding is evidenced by other conduct which accompanies or supplements the transaction."

It would seemingly follow that an alleged sale of one ounce of heroin on a particular day, without anything more, would not be sufficient to infer a pre-existing agreement between the parties.

To sustain the ruling herein would allow prosecutors to charge conspiracy in any situation where two or more persons are involved in a criminal transaction. This would have a devastating effect on the integrity of both the hearsay rule and the right to confrontation of witnesses. For these reasons, this would seem to be an appropriate case for further review by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Second Circuit Court of Appeals.

Dated: October 6th, 1975

Respectfully submitted,

s/ Gerald L. Shargel
Attorney for Petitioner

La Rossa, Shargel & Fischetti
Of Counsel

APPENDIX

JUDGMENT OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of September, one thousand nine hundred and seventy-five.

Present:

HON. J. JOSEPH SMITH

HON. PAUL R. HAYS

HON. THOMAS J. MESKILL

Circuit Judges,

United States of America,

Plaintiff-Appellee

v.

Samuel Kaplan,

Defendant-Appellant.

Judgment of United States Court of Appeals

75-1211

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-523

SAMUEL KAPLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a co-conspirator's hearsay statement should not have been admitted into evidence.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of distribution of heroin, in violation of 21 U.S.C. 841(a)(1), and was sentenced to eight years' imprisonment, to be followed by ten years' special parole. The court of appeals affirmed without opinion (Pet. App. 1a-2a).

The evidence showed that Frank Lange sold undercover federal narcotics agent Nicholas Alleva an ounce of heroin (Tr. 17-18).[1] Alleva testified that in a telephone conversation on January 5, 1972, he complained of the poor quality of the narcotics and asked about the quality of his next purchase. Lange stated that the quality would be "much better" and told Alleva to come to his house the following day when "his connection" would be present (Tr. 19-20; Pet. 6-7).

---

[1]Lange was originally named as a co-defendant, but he died before trial.

On January 6, 1972, Alleva arrived at Lange's residence as arranged. Lange greeted Alleva on the stairway and invited the agent to come upstairs to his bedroom. On entering the bedroom, Alleva observed petitioner reclining on a mattress (Tr. 20-23). No introductions were made.

Lange removed a plastic bag containing 25.6 grams of heroin from a night table drawer (Tr. 24, 34). Alleva looked at both petitioner and Lange and stated, "either one of you or both of you will have to go down with me to get the money" (Tr. 25). Petitioner asked why this procedure was being followed (Tr. 26). Alleva responded, "You guys beat me once, and you are not going to do it again," referring to his previous purchase of low-quality heroin (Tr. 26, 30). Petitioner then motioned to Lange, directing him to accompany the agent. Before Alleva left the room, petitioner reassured him of the quality of the heroin (Tr. 28). Shortly thereafter, both petitioner and Lange were arrested.

Petitioner objected *in limine* and at trial to the admission of Alleva's testimony concerning Lange's statement in the telephone conversation that his "connection" would be at the house. The court admitted the testimony under the co-conspirator exception to the hearsay rule (Tr. 16A). The court instructed the jury, however, that they could not consider the hearsay statements against petitioner unless his own acts and statements had shown him to be a member of the conspiracy (Tr. 214-215).

Petitioner contends (Pet. 9) that Lange's statements in the telephone conversation with Alleva should not have been admitted because there was insufficient proof that petitioner and Lange were conspiring with one another on

the day the statements were made.[2] But the record fully supports the implicit finding of both courts below that Lange's telephone conversation was made in the course of and in furtherance of a conspiracy with petitioner. The evidence showed that on the day following the telephone conversation, Lange gave the agent a bag of heroin in full view of petitioner and then discussed the transaction without any apparent reticence. Petitioner's reaction to Alleva's request to descend for payment, his instruction to Lange to comply with this request, his response to the agent's comments and his assurances concerning the quality of the drugs demonstrate that he was involved in a pre-existing drug distribution relationship with Lange.

The evidence furnished an ample basis for inferring that petitioner knew about and participated in the heroin transaction. Accordingly, the admission of Lange's hearsay statements against petitioner was proper. See *Anderson* v. *United States*, 417 U.S. 211, 218-219; *Lutwack* v. *United States*, 344 U.S. 604; *United States* v. *Cirillo*, 499 F. 2d 872 (C.A. 2), certiorari denied, 419 U.S. 1056; *United States* v. *Santos*, 385 F. 2d 43 (C.A. 7), certiorari denied, 390 U.S. 954; *United States* v. *Spanos*, 462 F. 2d 1012 (C.A. 9).

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[2]At petitioner's first trial, this testimony was admitted under the state-of-mind exception to the hearsay rule. The court of appeals reversed the resulting conviction, *United States* v. *Kaplan*, 510 F. 2d 606 (C.A. 2), ruling that petitioner was entitled to a new trial "at which this hearsay will be excluded." *Id.* at 610. However, the opinion contained a lengthy discussion of the possible application of the co-conspirator exception and concluded that the testimony could possibly be admissible on that basis. It also stated that had the district court judge made the findings necessary to support the admission of the testimony on this ground, those findings "would have been highly likely to stand on appeal." *Id.* at 612. Petitioner's contention (Pet. 8-9) that the first decision absolutely precluded introduction of this testimony on any basis at the second trial is therefore erroneous.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

DOJ-1975-12